

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:
	:
Petitioner	: No. 17-1220
v.	:
	:
ATLANTIC NORTHEAST TRANSPORT, INC.	: Board Case No.:
	: 22-CA-175081
Respondent	:

**OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD
TO ATLANTIC NORTHEAST TRANSPORT’S MOTION
TO RECALL THE CERTIFIED JUDGMENT**

To the Honorable, the Judges of the United States
Court of Appeals for the Third Circuit:

The National Labor Relations Board (“the Board”), by its Deputy Associate
General Counsel, opposes the motion of Atlantic Northeast Transport, Inc.

(“ANT”), to recall the certified judgment in the above-captioned case. It is well
established that recall of a certified judgment is an extraordinary remedy that can
only be granted in exceptional circumstances. ANT attempts to demonstrate
exceptional circumstances by misstating the facts surrounding the Board’s service
in this case. ANT’s motion is nothing more than an attempt to avoid the Board’s
Court-enforced remedial orders, which require ANT, among other things, to cease
threatening its employees and make whole employees harmed by ANT’s unlawful
actions. The Board requests that the Court deny its motion to recall the certified
judgment.

I. FACTS AND PROCEDURAL HISTORY

On July 21, 2016, the Board's General Counsel issued a complaint and notice of hearing in Case No. 22-CA-175081, charging Respondent with certain violations of the Act. Having not received an answer, on August 10, 2016, the Region sent Respondent a letter extending the time to file an answer to August 17, 2016, and stating that if no answer was received, the Regional Office would file a default judgment motion with the Board. Having still not received an answer, on September 20, 2016, the General Counsel filed with the Board a Motion for Default Judgment. The Board transferred the case to itself and issued a Notice to Show Cause, giving Respondent until October 5, 2016, to file a response. The Board did not receive any response and, on November 30, 2016, the Board issued its Decision and Order, granting the Motion for Default Judgment.

On January 26, 2017, the Board filed an application for summary entry of a judgment enforcing an order of the National Labor Relations Board. On March 8, 2017 the Court granted the Board's application and enforced the Board's order and entered a certified judgment. On March 10, 2017, counsel for ANT entered an appearance. On March 21, 2017, ANT filed its answer to the Board's application. On April 18, 2017, ANT filed a motion with the Circuit to recall its certified judgment.

II. ARGUMENT

In accordance with Federal Rules of Appellate Procedure 41(c), this Court's

normal practice is to issue a certified copy of its judgment, with any opinion attached, in lieu of issuing a formal mandate in a separate document. Accordingly, the grounds for recalling a mandate are similarly applicable to the grounds for recalling a certified judgment.

The Supreme Court has narrowly limited the circumstances in which courts of appeals can recall a mandate. Specifically, “in light of ‘the profound interests in repose’ attaching to the mandate of a court of appeals . . . the power [to recall a mandate] can be exercised only in extraordinary circumstances.” *Calderon v. Thompson*, 523 U.S. 538, 550 (1998) (citation omitted). The “sparing use” of the power to recall a mandate shows that it is “one of last resort, to be held in reserve against grave, unforeseen contingencies.” *Id.* “Exceptional circumstances” must be “sufficient to override the strong public policy that there should be an end to a case in litigation, that when the judgment therein becomes final the rights or liabilities of the parties therein are finally determined, and that the parties thereafter are entitled to rely upon such adjudication as a final settlement of their controversy.” *Hines v. Royal Indem. Co.*, 253 F.2d 111, 114 (6th Cir. 1958) (citation omitted). Thus, “exceptional circumstances” are those that require that the mandate be recalled to “prevent injustice.” *Gradsky v. United States*, 376 F.2d 993, 995 (5th Cir. 1967) (showing of good cause expressed through likelihood of injustice). *See also*, *Bellsouth Corp. v. FCC*, 96 F.3d 849, 851-52 (6th Cir. 1996) (collecting cases from

other circuits placing similar requirement of exceptional circumstances on parties seeking a recall of the mandate). In this case, ANT cannot meet the exceptional circumstances test when counsel for ANT states it received notice regarding the Board's application to the Court for enforcement of its order on February 24, 2017. Counsel could have contacted the Board or the Court, could have filed an appearance and certainly could have requested an extension of time. Such motions are routinely granted. But counsel did not act until filing an appearance on March 10th, two days after the Court issued its judgment.

In any event, as to the merits of ANT's argument, ANT complains that the Board was serving all the papers in the underlying case—the complaint, the letter extending the time for the answer, the motion for default judgment, and the Board's Decision and Order granting the motion for default judgment—to the wrong address. The Board sent these documents to “71 Central Avenue, Kearny, New Jersey 07032.” ANT states that its correct address is “71 Central Avenue, South Kearny, New Jersey 07032.” But ample evidence in this case supports the Board's finding that Kearny, without South in front of it, was an appropriate and effective address.

First, and attached hereto (Attachment A), is a certified mail receipt for the Board's September 20, 2016 Motion for Default judgment showing that delivery to “71 Central Avenue, Kearney, New Jersey 07032-8870” was signed as received by

ANT. Indeed, the attached search result from the United States Postal Service, Quick Tools, Look Up a Zip Code website page further confirms that “71 Central Avenue, Kearny, NJ 07032” is an appropriate address for ANT.¹ (Attachment B) The zip code for this employer is the same regardless whether Kearny or South Kearny is used; the post office is the same regardless whether Kearny or South Kearny is used; and there is only one 71 Central Avenue served by this post office.

Moreover, as the Board’s decision noted, 364 NLRB No. 155 n.1, the earlier July 21, 2016 complaint was also served by certified mail at this address and that was returned as “unclaimed,” as opposed to “no such addressee” or “undeliverable.” As the Board noted, “it is well settled that a respondent’s failure or refusal to claim certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. See *Cray Construction Group, LLC*, 341 NLRB 944, 944 fn.5 (2004); *I.C.E. Electric, Inc.*, 339 NLRB 247, 247 fn. 2 (2003).”

Finally, the Board noted that it sent to the Kearny address the August 10, 2016 letter advising ANT that a motion for default judgment would be filed unless an answer was received by August 17. This was sent by regular mail and not returned. As the Board noted, 364 NLRB No. 155 at 1 n.2, “failure to return documents served by regular mail indicated actual receipt” by the party to whom it

¹ United States Postal Service, Quick Tools, Look Up a Zip Code page link: <https://tools.usps.com/go/ZipLookupResultsAction!input.action?resultMode=1&companyName=&address1=71+Central+Ave&address2=&city=&state=Select&urbanCode=&postalCode=&zip=07032>

is addressed. *Id.*; *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987), *enfd. sub nom. NLRB v. Sherman*, 843 F.2d 1392 (6th Cir. 1988).”

In sum, while ANT’s motion quotes now-Chairman Miscamarra’s concurrence as stating “there may be some question regarding whether the Respondent’s correct address (used for purposes of service) is ‘Kearny, New Jersey’ or ‘South Kearny, New Jersey,’” now-Chairman Miscamarra goes on to correctly state, “[i]t appears that both addresses result in delivery to the same physical location.” 364 NLRB No. 155 at 1 n.3.

Accordingly, the facts set forth above demonstrate that the Board used an appropriate and effective address to serve ANT and, as such, there is no basis for ANT’s motion to recall the certified judgment.

WHEREFORE, the Board respectfully requests that the Court deny ANT’s motion to recall the certified judgment.

Respectfully submitted,

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half St., S.E.
Washington, D.C. 20570
(202) 273-2960

Dated at Washington, D.C.
this 24th day of April, 2017

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> Complete items 1, 2, and 3. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 	<p>A. Signature <input checked="" type="checkbox"/> <i>[Signature]</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p>
<p>1. Article Addressed to:</p> <p><i>Matthew Tenore, V.P. Atlantic Northeast Transport Inc. 71 Central Avenue Kearny, NJ 07032-8870</i></p> <p>9590 9401 0043 5168 7141 38</p>	<p>B. Received by (Printed Name)</p> <p>C. Date of Delivery</p>
<p>2. Article Number (Transfer from service label)</p> <p><i>7015 1520 0000 8112 648</i></p>	<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>
<p>Service-Type</p> <p><input type="checkbox"/> Adult Signature <input type="checkbox"/> Adult Signature Restricted Delivery <input type="checkbox"/> Certified Mail® <input type="checkbox"/> Certified Mail Restricted Delivery <input type="checkbox"/> Collect on Delivery <input type="checkbox"/> Collect on Delivery Restricted Delivery <input type="checkbox"/> Insured Mail <input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)</p>	<p><input type="checkbox"/> Priority Mail Express® <input type="checkbox"/> Registered Mail™ <input type="checkbox"/> Registered Mail Restricted Delivery <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Signature Confirmation™ <input type="checkbox"/> Signature Confirmation Restricted Delivery</p>

PS Form 3811, April 2015 PSN 7530-02-000-9053

Domestic Return Receipt

U.S. Postal Service™
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For delivery information, visit our website at www.usps.com®.

OFFICIAL USE

Certified Mail Fee \$

Extra Services & Fees (check box, add fee as appropriate)

☐ Return Receipt (hardcopy) \$

☐ Return Receipt (electronic) \$

☐ Certified Mail Restricted Delivery \$

☐ Adult Signature Required \$

☐ Adult Signature Restricted Delivery \$

Postage \$

Total Postage and Fees \$

Sent *Matthew Tenore, Atlantic NE*

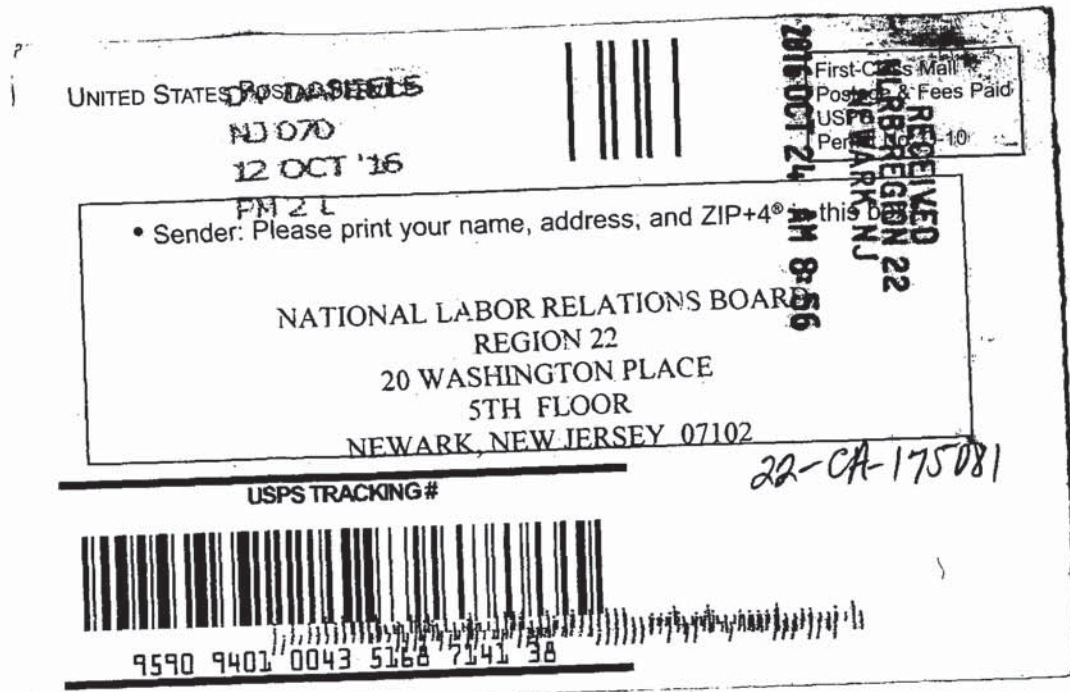
Street and Apt. No., or PO Box No.

City, State, ZIP+4®

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions

NEWARK, NJ 07102B
SEP 20 2016
MIDTOWN STATION

Attachment A



Certified Mail service provides the following benefits:

- A receipt (this portion of the Certified Mail label).
- A unique identifier for your mailpiece.
- Electronic verification of delivery or attempted delivery.
- A record of delivery (including the recipient's signature) that is retained by the Postal Service™ for a specified period.
- For an electronic return receipt, see a retail associate for assistance. To receive a duplicate return receipt for no additional fee, present this USPS®-postmarked Certified Mail receipt to the retail associate.
- Restricted delivery service, which provides delivery to the addressee specified by name, or to the addressee's authorized agent.
- Adult signature service, which requires the signee to be at least 21 years of age (not available at retail).
- Adult signature restricted delivery service, which requires the signee to be at least 21 years of age and provides delivery to the addressee specified by name, or to the addressee's authorized agent (not available at retail).

Important Reminders:

- You may purchase Certified Mail service with First-Class Mail®, First-Class Package Service®, or Priority Mail® service.
- Certified Mail service is not available for international mail.
- Insurance coverage is not available for purchase with Certified Mail service. However, the purchase of Certified Mail service does not change the insurance coverage automatically included with certain Priority Mail items.
- For an additional fee, and with a proper endorsement on the mailpiece, you may request the following services:
 - Return receipt service, which provides a record of delivery (including the recipient's signature). You can request a hardcopy return receipt or an electronic version. For a hardcopy return receipt, complete PS Form 3811, Domestic Return Receipt; attach PS Form 3811 to your mailpiece;
 - To ensure that your Certified Mail receipt is accepted as legal proof of mailing, it should bear a USPS postmark. If you would like a postmark on this Certified Mail receipt, please present your Certified Mail item at a Post Office™ for postmarking. If you don't need a postmark on this Certified Mail receipt, detach the barcoded portion of this label, affix it to the mailpiece, apply appropriate postage, and deposit the mailpiece.

IMPORTANT: Save this receipt for your records.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

ATLANTIC NORTHEAST TRANSPORT, INC.

and

Case 22-CA-175081

NOORUDDIN HANIF

AFFIDAVIT OF SERVICE OF: Motion for Default Judgment

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on September 20, 2016, I served the above-entitled document(s) by **certified and regular mail and/or electronic mail** on the following parties:

ELECTRONIC MAIL

David Tykulsker, Esq., David Tykulsker & Associates at david@dtesq.com

CERTIFIED MAIL & REGULAR MAIL

Matthew Jenove, Vice President
Atlantic Northeast Transport, Inc.
71 Central Avenue
Kearny, NJ 07032-8870

September 20, 2016

Date

Evamaria Cox, Designated Agent of NLRB

Name


Signature

Look Up a ZIP Code™

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Cities by ZIP Code™

You entered:

71 CENTRAL AVENUE
07032

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KEARNY NJ 07032-4602

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Attachment B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Petitioner	: No. 17-1220
v.	:
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ATLANTIC NORTHEAST TRANSPORT, INC.	: Board Case No.:
	: 22-CA-175081
Respondent	:

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Third Circuit. I certify that the foregoing document was served on their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

David K. Broderick
One Newark Center
1085 Raymond Boulevard, 8th Floor
Newark, New Jersey 07102

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Dated at Washington, D.C.
this 24th day of April, 2015